



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-11*

FACTS:

The Wampanoag Tribe of Gay Head (also known as “Aquinnah”) (Tribe) is a federally recognized Indian tribe which is the successor to the Wampanoag Tribal Council, Inc., a non-profit charter corporation of Massachusetts. According to the findings of the Bureau of Indian Affairs which formed the basis for federal recognition, the Gay Head Wampanoags have been identified as being American Indians from historical times until the present and have inhabited the Gay Head area since the first sustained contact with European settlers in 1642. The Wampanoags have historically continued to maintain social and tribal relations among themselves and tribal political influence over tribe members. After obtaining federal recognition, the tribe enacted a Constitution which superseded the by-laws of the Council and the Council ceased to exist. According to the Wampanoag Constitution,

We, the native Wampanoag people of Aquinnah, in order to sustain and perfect our historic form of tribal government, do proclaim and establish this constitution for the Wampanoag Tribe of Gay Head (Aquinnah).

Our tribal government shall be dedicated to the conservation and careful development of our tribal land and other resources, to promote the economic well-being of all tribal members, to provide educational opportunities for ourselves and our posterity, and to promote the social and cultural well-being of our people.

Members of the tribe are those individuals who can document their descent from a specifically identified Gay Head Wampanoag Indian on the 1870 census roll of the tribe compiled by Richard L. Pearce and included in a report submitted to the State of Massachusetts on May 22, 1871. *See Wampanoag Constitution.*

The Tribe is governed by a Tribal Council whose members are elected by all tribal members who are at least 18 years of age. There are also two ceremonial positions which consist of a chief and a medicine man. The Tribal Council has sovereign powers to govern the tribe, except as are limited by the Settlement Act granting the Indian land and the laws of the United States. For example, the Council may establish an ordinance creating a judicial branch of government with jurisdiction over “all cases and matters in law and equity arising under the settlement act, this constitution, and the ordinances of the tribe” subject to limitations imposed by the laws of the United States. *See Wampanoag Constitution.*

Some tribal officials are also members of municipal boards in Gay Head or members of other public entities, such as the Martha’s Vineyard Land Bank.

QUESTION:

Is the Wampanoag Tribe of Gay Head a “business organization” for purposes of G.L. c. 268A, §19 so that officials of the Tribe who are also municipal officials must abstain in matters affecting the Tribe’s financial interest?

ANSWER:

The Wampanoag Tribe of Gay Head is not a “business organization” for purposes of G.L. c. 268A, §19. Members of the Tribe who are also municipal officials are not required to abstain in matters affecting the financial interest of the Tribe, but they are required to make a public disclosure prior to participating in such matters in accordance with G.L. c. 268A, §23(b)(3).

DISCUSSION:

G.L. c. 268A, §19 states, in pertinent part, that a municipal employee may not participate as such an employee in any matter in which he, his immediate family or a partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest. The underlying principle upon which this section is based is that a government official should not be in a position to act on a matter in which his private financial interests are involved or the financial interests of individuals close to him are involved. See, *Perkins, The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1129 (1963). Section 19 does not apply to every relationship which a public employee has. For example, not every family relationship is covered. See, G.L. c. 268A, §1(e) (immediate family defined as the employee and his spouse, their parents, children, brothers and sisters). In addition, we have previously noted that the Legislature made a distinction within §19 between the narrower category of a business organization in which a public employee is an officer, director, trustee, partner, or employee and the broader category of any person or organization with whom the employee is negotiating or has an arrangement for prospective employment. *EC-COI-92-3*.

When construing statutory language, we are guided by the canon that “[t]he intent of the Legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill. Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous.” (citations omitted) *Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984); *Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance, Co.*, 371 Mass. 186, 190 (1976). Accordingly, we look to the language of the statute and conclude that the plain meaning of the term “business organization” is an organization whose purpose is to engage in “commercial activity for gain, benefit, advantage, or livelihood.” *Black’s Law Dictionary*, Fifth Edition, 1979. See, *EC-COI-88-4* (“if the purpose of an organization is to conduct business, it is within the terms of the statute”); *84-43* (same); *84-44* (bank is business corporation); *83-105* (private law firm).

In the past we have not limited the term’s application to profit-making entities. The Commission has extended this analysis to include municipalities, as municipalities are organized as “bodies corporate,”^{1/} for the purpose of engaging in municipal business. G.L. c. 40 §1. See, *EC-COI-89-2*; *84-7*; *81-62*; *82-25* (regional school district organized as “body politic and corporate” a business organization); *81-119* (state agency organized as “body corporate” a business organization); *Attorney General Conflict of Interest Opinion No. 613*, February 5, 1974 (town and various town departments are business organizations). In comparison, other government entities, such as the federal government, which are not organized as “bodies corporate” may not be considered business organizations. *EC-COI-92-3*. Although early Commission opinions indicated that the Commonwealth was a business organization for purposes of §19, later Commission decisions have not so concluded. Compare, *EC-COI-82-13* (Commonwealth a business organization) with *EC-COI-85-67* (two state board members affiliated with municipal entities required to abstain but board member whose state agency had financial interest not required to abstain); *Attorney General Conflict of Interest Opinion No. 30*, April 25, 1963 (state counterpart to §19 excludes business of a public state entity).

Applying these principles to the Wampanoag Tribe we conclude that the Tribe is not a business organization for purposes of §19. The United States has defined the term “tribe” to be “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” *Montoya v. United States*, 180 U.S. 261, 266 (1900); *United States v. Candelaria*, 271 U.S. 432, 431 (1925); *Mashpee Tribe v. New Seabury*, 592 F.2d 575, 582 (1st Cir. 1979).^{2/} As one court has noted, “[t]he term ‘tribe’ is most commonly used in two senses, an ethnological sense and a political sense although it may also be used in a social sense.” *United States v. State of Washington*, 476 F.Supp. 1101, 1103 (W.D. Wash. 1979). According to 25 USC §1771f, the Tribe enjoys a “government to government relationship with the United States.”^{3/} Indian tribes have the power to regulate intratribal affairs, to establish tribal courts, to manage the use of their territory, to regulate economic activity within the reservation and to levy taxes within the reservation on tribal members and non-members. See generally, 42 C.J.S. Indians §23 et. seq.; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-336 (1983). Thus, the Tribe is not organized for the primary purpose of engaging in commerce or as a “body corporate”, but rather, is organized to advance the goals of a particular

society whose members share blood ties and which possesses attributes of political entities, such as the federal government or state government.

We therefore conclude that the Tribe is not a business organization for purposes of §19, and that tribal officials who are also municipal officials are not required to abstain in particular matters affecting the Tribe's financial interest.^{4/} However, these officials will be required to make a full public disclosure under §23(b)(3) prior to participating in a matter in which the Tribe has an interest. Section 23(b)(3) prohibits a municipal employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. Issues are raised under this section because of the municipal official's affiliation with the Tribe. This relationship creates an appearance of a conflict of interest or bias in one's official actions as a result of one's private interests. *EC-COI-89-16* (past friendship relationship); *88-15* (private dealings with development company); *85-77* (private business). In order to dispel the appearance of a conflict, §23 (b)(3) requires that an appointed Wampanoag municipal employee file a full written disclosure with his appointing authority prior to participating in a matter affecting the Tribe. Elected Wampanoag municipal officials are required to file a full written disclosure with the town clerk prior to any participation. *See EC-COI-91-3; 90-2; 89-19.*

Date Authorized: April 13, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}The definition of "body corporate" is "a public or private corporation." *Black's Law Dictionary*, Fifth Edition 1979.

^{2/}Relevant factors in a determination of whether a particular group of Indians will be considered a tribe are: "the extent to which the group's members are persons of Indian ancestry who live and were brought up in an Indian society or community; the extent of Indian governmental control over their lives and activities; the extent and nature of the members' participation in tribal affairs; the extent to which the group exercises political control over a specific territory; the historical continuity of the foregoing factors; and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and the Indians." *United States v. State of Washington*, 476 F.Supp. 1101, 1110 (W.D. Wash. 1979).

^{3/}The relationship of the United States to the Indians is basically a trust relationship. *See, Winton v. Ames*, 255 U.S. 373, 391-392 (1921). Indian tribes are subject to the exclusive authority of Congress and, in the absence of federal law to the contrary, Indian tribes are not subject to the laws of the state or territory where the tribe is located. *See generally*, 42 C.J.S. Indians §§ 25, 38, 54.

^{4/}Our conclusion is based on the facts which you have presented. Were the Tribe, as an entity, to become involved in significant business activity, you should renew your opinion request. Furthermore, we note that under certain circumstances, tribal members who are also municipal employees may be required to abstain under §19. For example, if the Tribe established a non-profit or other corporate entity for the purpose of developing real estate, and a Wampanoag municipal employee was an officer of the corporation, he would be required to abstain if the corporation sought a permit from his municipal board.